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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 657

WESTERN CARTRIDGE COMPANY, WINCHESTER REPEATING ARMS COMPANY DIVISION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court below (R. 963–967) is reported in 138 F. (2d) 551. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 905–949) are reported in 43 N. L. R. B. 179.

### JURISDICTION

The decree of the court below was entered on January 11, 1944 (R. 968–970). The petition for a writ of certiorari was filed on January 31, 1944.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

### QUESTION PRESENTED

Whether under the circumstances of this case petitioner was denied a fair hearing because of the conduct of the trial examiner who presided at the taking of the evidence.

### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra,* pp. 12–13.

### STATEMENT

After the filing by the Union[1] of charges that petitioner had violated Sections 8 (1) and (3) of the Act (R. 751–752), the Board issued a complaint against petitioner alleging the commission of unfair labor practices under these sections (R. 745–748). Petitioner answered, and a hearing was held before a trial examiner of the Board on March 23, 24, and 30 and April 2, 1942 (R. 4–741). During the course of the hearing evidence introduced indicated that petitioner had also committed unfair labor practices under Section 8 (2) of the Act by dominating, interfering

[1] United Electrical Radio & Machine Workers of America, C. I. O. (R. 763).

with the administration of, and contributing support to, the Employees Representation Plan and the Winchester Council. As a result, the Union, on April 1, 1942, filed supplemental charges that petitioner had violated Section 8 (2) of the Act (R. 776–777), and the Board, on April 2, 1942, issued an amended complaint based thereon (R. 778–782). On the latter date the petitioner entered into a stipulation consenting to the entry of an order by the Board and a decree by any appropriate circuit court of appeals requiring petition to cease and desist from its violations of Section 8 (1) and (2) of the Act and to withdraw recognition from and disestablish the dominated labor organizations (R. 784–790).

On April 18, 1942, the trial examiner issued his intermediate report finding that petitioner had discriminatorily discharged three employees in violation of Section 8 (1) and (3) of the Act and had in other respects interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act (R. 843–880). Thereafter, on May 8, 1942, petitioner filed with the Board a motion to remand the case to another trial examiner for the asserted reason that the trial examiner who had conducted the hearing was prejudiced against witnesses of petitioner, that he permitted matters to be discussed before him which were in their nature prejudicial to petitioner, and that the Board attorney who tried

the case assisted the trial examiner in acts which by their nature were prejudicial to petitioner (R. 882–883). The motion gave no further particulars as to the respects in which the trial examiner was allegedly disqualified. In petitioner's exceptions to the intermediate report, filed on May 28, 1942 (R. 888–899), the basis for its charges of disqualification was stated as follows: At the opening of the hearing the trial examiner permitted a discussion before him relative to a possible settlement of the case (R. 891);[2] he required counsel for petitioner to explain the relevance of a certain line of testimony which the latter was introducing into the record (R. 892, 229–230); the trial examiner's statement that the employment record of a witness subsequent to his discharge would be relevant only in the event there was an order of reinstatement disclosed he was conducting the hearing in an unorthodox manner (R. 892, 899, 236–237); the manner in which the trial examiner resolved certain conflicting testimony in his intermediate report disclosed his prejudice (R. 893–898); certain questions put by the trial examiner to a witness constituted an attempt to "snare a witness into an uncomfortable position" (R. 897, 401–403); the trial examiner showed his prejudice by asking certain questions

[2] The record discloses that the reference to settlement negotiations was introduced into the record by petitioner's own counsel to support his request for a continuance of the hearing (R. 10–17).

so improper that he himself withdrew them when so requested by counsel for petitioner (R. 897, 607, 647); the trial examiner improperly participated in the discussion which took place in the oral argument before him (R. 897–898, 705–741); and the trial examiner improperly participated in the questioning of witnesses (R. 899).

The Board, after receiving the briefs of petitioner and hearing oral argument, on August 14, 1942, issued its decision in which it reviewed the evidence extensively and made its own findings of fact and conclusions of law (R. 905–945). It considered petitioner's charges that the trial examiner was biased and prejudiced, and found them groundless (R. 914–915). The Board found that petitioner, in violation of Section 8 (1) and (3) of the Act (R. 929–930, 934, 941), had discharged three employees because of their union membership, and that through its supervisory employees it had engaged in other antiunion conduct and coerced its employees in violation of Section 8 (1) of the Act (R. 942). The Board ordered petitioner to cease and desist from the unfair labor practices found, to reinstate the discharged employees with back pay, and to post appropriate notices (R. 945–949).[3]

[3] Pursuant to the stipulation entered into at the hearing with respect to an alleged violation by petitioner of Section 8 (2) of the Act, the Board also ordered petitioner to cease and desist from its alleged violation and to disestablish a labor organization alleged to have been dominated by it (R. 947–949).

On December 18, 1942, the Board filed a petition for enforcement of its order in the court below (R. 958–963). On November 3, 1943, the court handed down its decision enforcing the Board's order in full (R. 963–967). On January 11, 1944, the court entered its enforcement decree (R. 968–970).

## ARGUMENT

The sole question presented is whether the conduct of the trial examiner denied petitioner a fair hearing. Not a single instance of alleged misconduct is set forth in the petition. The instances of alleged misconduct relied upon by petitioner before the Board have been summarized in the statement (p. 3–5, *supra*). They are not of such a character as to vitiate the proceedings, especially where, as in the instant case, the Board itself extensively reviewed the record and issued its own findings and order. The court below properly held that petitioner, having failed to show that it suffered any prejudice by reason of the alleged misconduct of the trial examiner, could not thereby defeat the Board's order (R. 966). Decisions of this and other courts have uniformly held that, in the absence of prejudice, irregularities in the hearing afford no ground for setting aside the

Board's orders.[4] The case therefore presents no question warranting review.

Each of the cases with which petitioner claims a conflict (Pet. 3) turns on its own facts. In *Inland Steel Co.* v. *National Labor Relations Board,* 109 F. (2d) 9 (C. C. A. 7) and *Montgomery Ward & Co.* v. *National Labor Relations Board,* 103 F. (2d) 147 (C. C. A. 8) the court held that the examiners, despite timely objections, improperly caused pertinent proceedings to be omitted from the record (109 F. (2d) at 13–14;

[4] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350–351; *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, 589 (C. C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 496 (C. C. A. 3); *Subin* v. *National Labor Relations Board* 112 F. (2d) 326, 332 (C. C. A. 3), certiorari denied, 311 U. S. 673; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888, 889 (C. C. A. 5); *Continental Box Co., Inc.* v. *National Labor Relations Board*, 113 F. (2d) 93, 96 (C. C. A. 5); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905, 909 (C. C. A. 6), certiorari denied, 312 U. S. 689; *Cupples Co. Manufacturers* v. *National Labor Relations Board*, 106 F. (2d) 100, 113 (C. C. A. 8); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 651–653 (App. D. C.).

103 F. (2d) at 149–151) and improperly restricted employers' attorneys in their examination of witnesses (109 F. (2d) at 18; 103 F. (2d) at 151–156). It is not contended that in the instant case any part of the proceedings was omitted from the record or that the examiner failed to accord petitioner full opportunity to introduce evidence, cross-examine witnesses called by the Board, and otherwise meet the evidence against it. In *National Labor Relations Board* v. *Phelps,* 136 F. (2d) 562 (C. C. A. 5) relied on by petitioner (Pet. 9), the court found that the examiner had procured a stipulation under false pretenses and subsequently used it to institute proceedings against another party (136 F. (2d) at 564–565). No claim is made that such misconduct occurred in the instant case.

Petitioner's further assertion (Pet. 7–8) that the decision of the court below is in conflict with the decisions of this Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304–305; *Tumey* v. *Ohio,* 273 U. S. 510, 522; and *Jordan* v. *Massachusetts,* 225 U. S. 167, 176, is also without foundation. Those cases involved, respectively, a commission's use of matters outside the record, a judge's pecuniary interest, and a juror's mental competency. None of these elements is to be found here. Similarly, *Union Pacific Railroad Co.* v. *Syas,* 246 Fed. 561 (C. C. A. 8), cited by petitioner (Pet. 8, 10), involved

the submission of a prejudicial issue to the jury. Each of these cases turns on its own facts and raises no conflict.

Petitioner strongly urges that the decision below departs from the salutary rule announced by this Court in the *Tumey* case, namely, that "no matter what the evidence was against him [the defendant], he had the right to have an impartial judge" (273 U. S. at 535). Unlike the *Tumey* case, however, there is no basis in this record for any claim that the trial examiner was interested, pecuniarily or otherwise, in the outcome of the proceeding before him. While the conduct of the trial examiner may have "left much to be desired," as the court below characterized it (R. 966), the record does not support the inference that he was hostile to petitioner or biased in favor of the Board. The trial examiner may have indulged in lengthy and perhaps unnecessary interrogation of petitioner's witnesses; but this is not equivalent to a lack of the requisite impartiality. Petitioner relies upon the statement of the court below that the trial examiner "prolonged the hearings unduly by needlessly taking over the examination of witnesses * * *. In so doing he did much to destroy any faith in his impartiality, and had this been a close case his conduct might have been sufficient cause for the denial of this petition" (R. 966). In so stating, however, the court below was holding what the record

plainly shows, namely, that petitioner has not suffered any prejudice because of the trial examiner's alleged misconduct. Moreover, no question has been raised as to the impartiality of the Board, and it is the Board, not the trial examiner, which made the findings forming the basis for the order which was enforced by the court below. *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, 588 (C. C. A. 2).[5] The Board itself reviewed the evidence and made its own findings of fact and conclusions of law. These findings and conclusions were reached by the Board after petitioner had called to its attention the alleged misconduct on the part of the trial examiner. The Board sifted petitioner's charges and found them without merit (R. 914–915). There is no basis in the record, therefore, for the belief that the Board was influenced by the alleged partiality of the trial examiner.

In sum, the court below properly held that the conduct of the trial examiner had not, on the record presented, denied petitioner the imparti-

[5] Accord: *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 225 (C. C. A. 3), certiorari denied, 311 U. S. 705; *Burk Brothers* v. *National Labor Relations Board*, 117 F. (2d) 686, 688 (C. C. A. 3), certiorari denied, 313 U. S. 588; *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 496 (C. C. A. 3); *Ford* case, *supra*, at p. 909; *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. (2d) 671, 672 (C. C. A. 9); cf. *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 285–286.

ality of judgment to which it was entitled. Its decision presents no conflict with decisions of this or other courts.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1944.